STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2001
v	No. 223964 Oakland Circuit Court
WILLIE ARTHUR BROWN, Defendant-Appellant.	LC No. 99-167285-FC

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree murder, MCL 750.316. Defendant was sentenced to natural life in prison without the possibility of parole for one count of first-degree murder supported by two theories, first-degree premeditated murder and first-degree felony murder. Defendant was sentenced as a fourth habitual offender, MCL 769.12. We affirm.

Defendant contends that the trial court abused its discretion when it allowed the prosecution to introduce into evidence the details of defendant's 1979 conviction for second-degree murder, MCL 750.317, pursuant to MRE 404(b)(1). The trial court ruled that the evidence was relevant to show modus operandi, identity, motive, and intent, and relevant to negate defenses of accident, heat of passion, and absence of premeditation or deliberation. Defendant's primary contention is that the evidence was substantially more prejudicial than probative. A trial court's decision with regard to the admission of evidence is reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Generally, MRE 404(b)(1) governs a trial court's decision to admit or exclude prior bad acts evidence:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Our Supreme Court explained that, when determining whether to admit evidence of other bad acts committed by the defendant, the court should conduct the following analysis:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a "'determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.'" [*Sabin, supra* at 55, quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).]

"MRE 404(b) is a rule of inclusion and courts should adopt a flexible approach when ruling on the admissibility of prior bad acts evidence." *People v Hawkins*, 245 Mich App 439, 448; 628 NW2d 105 (2001).

Here, there were approximately thirty-three similarities between the 1979 crime and the instant offense. After reviewing these similarities, we concur with the trial court's assessment that this crime was admissible to prove or disprove several facts of consequence at trial. MRE 402. Moreover, the evidence was plainly admissible for reasons beyond merely a character to conduct or propensity theory. MRE 404(b). Thus, the only remaining question concerns whether the evidence was substantially more prejudicial than probative. *Sabin, supra* at 55; MRE 403.

Defendant contends that the evidence was prejudicial because it was damaging to his case. However, MRE 403 does not prohibit the introduction of prejudicial evidence; rather, it prohibits the introduction of evidence that is "unfairly prejudicial." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The *Crawford* Court explained that unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Id.* On the other hand, the Court also recognized that a defendant's earlier commission of the same crime carries a high risk that the evidence will be unfairly prejudicial because it may lead the jurors to conclude that "the defendant is a bad person, a convicted criminal, and that if he 'did it before he probably did it again.'" *Crawford, supra* at 398, quoting *United States v Johnson*, 27 F 3d 1186, 1193 (CA 6, 1994).

In the instant matter, witnesses and photographic evidence placed defendant with the victim within a few hours of his murder. There was also testimony that indicated defendant's guilt based on events occurring after the murder, such as possessing the victim's personal goods and driving his vehicle. Although there were no eyewitnesses to the instant offense, this circumstantial evidence was probably sufficient to support defendant's conviction even without evidence of the 1979 offense. Accordingly, we do not believe that this was a case where evidence of the prior bad act improperly elevated marginally probative evidence into a conviction. See *Crawford, supra* at 398. Instead, we believe that the evidence of the 1979 offense was another piece of circumstantial evidence corroborating other competent evidence that was probative of defendant's guilt.

Regardless, the admissibility of the 1979 offense was, at the very least, a close evidentiary question. Indeed, we are mindful that reasonable minds could reach a different conclusion. By definition, however, a decision on a close evidentiary question is ordinarily not an abuse of discretion. *Sabin, supra* at 67. Consequently, we conclude that the trial court did not err by admitting evidence of the 1979 offense.

Defendant argues that there was insufficient evidence to allow the jury to find him guilty of first-degree premeditated murder and first-degree felony murder. Defendant contends that the conviction was based upon circumstantial evidence. Defendant also contends that the testimony of two witnesses lacked credibility. However, "the determination of witness credibility is the function of the jury and not of the reviewing court." *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

In regard to the sufficiency of the evidence supporting a conviction, we have opined as follows:

> When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. [*People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).]

Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *Id.*

First-degree premeditated murder is the intentional killing of another, done with premeditation and deliberation. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). The elements of felony-murder are: (i) "the killing of a human being," (ii) "with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result," and (iii) "while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316." *Id.* at 642-643. Among the felonies enumerated in MCL 750.316 is "larceny of any kind."

As noted above, eyewitness testimony and photographic evidence placed defendant with the victim on the night of the victim's death. There was also testimony that defendant made incriminating statements which, although falling short of an admission of guilt, certainly suggested that defendant told two witnesses that he harmed the victim. Indeed, defendant bragged of putting the victim to "sleep." Other testimony established that defendant was driving the victim's car and possessed some of the victim's personal property the day after the murder. Viewing this evidence in a light most favorable to the prosecution, we are persuaded that there was sufficient evidence supporting a felony-murder conviction. In addition, the aforementioned evidence of the 1979 offense and its many similarities to the instant offense, viewed in a light most favorable to the prosecution, provide ample evidence supporting a finding that the murder was intentional, deliberate, and premeditated, as necessary to support defendant's first-degree premeditated murder conviction, as well.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens